International Union of Operating Engineers, Local Nos. 77, 77-A, 77-RA, 77-B, 77-C, 77-D, AFL-CIO[1] *and* C. J. Coakley Co., Inc. and Laborers' International Union of North America, Local Union 74, AFL-CIO.[2] Case 5-CD-266

July 31, 1981

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by C. J. Coakley Co., Inc., herein called the Employer, alleging that International Union of Operating Engineers, Local Nos. 77, 77-A, 77-RA, 77-B, 77-C, 77-D, AFL-CIO, herein called Operating Engineers, violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by it rather than to employees represented by Laborers' International Union of North America, Local Union 74, AFL-CIO, herein called Laborers.

Pursuant to notice, a hearing was held before Hearing Officer William D. Miller, Jr., on January 21, 1981. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer, Operating Engineers, and Laborers filed briefs which have been duly considered.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Virginia corporation with its principal place of business in Merrifield, Virginia, is engaged in commercial construction. During the past 12 months, a representative period, the Employer had gross revenues in excess of $500,000 and, during that same period, performed services valued at more than $50,000 outside the Commonwealth of Virginia.

Based on the foregoing, we find that C. J. Coakley Co., Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

[1] Respondent's name appears as amended at the hearing.

[2] The interested party's name appears as amended at the hearing.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Operating Engineers and Laborers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer is a commercial contractor engaged in lathe and plaster work, spray fireproofing, and the installation of drywall and acoustical tile. On July 24, 1980,[3] the Employer entered into a contract with Charles H. Tompkins Company to perform interior finishing work at the Dirksen Senate Office Building project in Washington, D.C. This agreement states, *inter alia*, that Tompkins "will provide hoist and hoist facilities" (i.e., a mechanical device used to move materials from floor-to-floor) for the Employer at the jobsite. After the parties executed the contract, however, Tompkins offered to pay all costs involved in operating the hoist if the Employer would provide the equipment. The Employer subsequently agreed to erect the hoist and operate it on a daily basis.

Consequently, in late October, the Employer contacted Paul Schwesig, a member of Operating Engineers, and asked him to serve as its hoist operator on the Dirksen project. Schwesig indicated his willingness to perform the work, but stated that the Employer would have to make arrangements with Operating Engineers. Upon learning that the Employer had decided to employ Schwesig, Charles Davidson, the Operating Engineers business representative, contacted the Employer concerning the hoist operation. Davidson told Cornelius Coakley, the Employer's president, that Schwesig could work at the jobsite if the Employer entered into a collective-bargaining agreement with Operating Engineers. Coakley indicated that he would sign the contract after his lawyers had reviewed the provisions contained therein.[4] Davidson subsequently delivered to the Employer a copy of the existing areawide agreement between Operating Engineers and the Construction Contractor's Council. Pursuant to the understanding between Coakley and Davidson, Schwesig began working for the Employer on November 4.

Davidson then went out of town for about 3 weeks. On December 1, Davidson learned that the Employer had not yet executed the Operating Engineers contract. At or about this time, the Employer began using forklifts, the subject of the in-

[3] All dates herein are in 1980 unless otherwise indicated.

[4] Previously, the Employer had never been a party to a collective-bargaining agreement with Operating Engineers.

stant dispute, on the Dirksen project. The Employer assigned this work to employees represented by Laborers in accordance with its collective-bargaining agreement with Laborers. Thereafter, during a meeting on December 8, Davidson told Coakley that Operating Engineers needed a contract with the Employer so that it could lawfully collect fringe benefit contributions on Schwesig's behalf.[5] Coakley replied that he wanted more time to review the proposed contract. Although he was unsuccessful in his efforts to reach Coakley over the next week, Davidson did leave several messages with Coakley's secretary.[6] On December 12 Davidson informed Coakley's secretary that there was "an additional problem now that the Laborers were using the forklift." On December 15 Davidson told Coakley's secretary that "there was a problem with the forklift and the contract."

On December 18 Davidson and Coakley met in the Employer's office to discuss the proposed contract. Coakley stated that he would not sign the Operating Engineers standard contract because it would require the Employer to submit jurisdictional disputes to the Impartial Jurisdictional Disputes Board, herein called IJDB. In reference to Davidson's message of the previous week, Coakley also mentioned that he could not execute an agreement which contained a jurisdictional clause providing for the assignment of forklift work to employees represented by Operating Engineers. Coakley noted that he already had assigned such work to employees represented by Laborers. Davidson continued to demand, however, that Coakley sign the Operating Engineers standard contract. In addition, Davidson insisted that the Employer assign the forklift work at the jobsite to employees represented by Operating Engineers. When Coakley suggested that they sign a project agreement applying only to Schwesig's work at the Dirksen site, Davidson replied that Operating Enginers considered "special agreements just like a sweetheart clause . . . ." Davidson then told Coakley that he would have to remove Schwesig from the job "because of the fact that I can't have a man working for you if I don't have a contract."

Before leaving the Employer's office, Davidson contacted Hal Keefer, Tompkins' project superintendent at the Dirksen project, and informed him that Coakley would not sign a contract. Davidson also called Paul Altman, vice president of Tompkins, to advise him "he was going to have troubles because Coakley would not sign [the] agreement." Thereafter, Davidson went directly to the Dirksen jobsite, where he told Schwesig to stop work. Accompanied by Schwesig, Davidson then proceeded to the office of Tom Yorty, the Employer's project manager. Davidson informed Yorty of his decision to pull Schwesig from the job because of the Employer's refusal to sign a contract. Davidson also remarked "that he had men on the job [employed by other employers] watching out and that [Yorty] was not to touch the hoist or the forklift. If [Yorty] did, something would happen. And you know what that means." Concerned about its potential liability for any labor problems under its subcontracting agreement with Tompkins, the Employer decided to shut down all operations involving the use of forklifts or the hoist. The Employer continued its other operations on the jobsite.

On December 20, Davidson again met with Coakley to discuss the possibility of entering into a collective-bargaining agreement. Coakley reiterated his position that he would not sign a contract containing either IJDB language or a jurisdictional clause which covered forklift operations. Davidson replied that "he had to have the forklift, that he had a reduced rate for [the Employer] and that he would let [the Employer] have an apprentice at the $9.15 rate. But that he had to have it." Coakley then discussed the possibility of entering into a project agreement, but Davidson again refused to do so. Before the meeting ended, Davidson told Coakley that "he had to have this agreement signed because otherwise he could not get the health and welfare benefits." The parties had no further discussions concerning this matter.

Thereafter, Tompkins, which has a collective-bargaining agreement with Operating Engineers, hired Schwesig as the hoist operator for the Dirksen project. On December 23, the Employer resumed its forklift operations utilizing employees who are represented by Laborers.

On December 29, the Employer filed the instant charge alleging that Operating Engineers had violated Section 8(b)(4)(D) of the Act. Operating Engineers subsequently advised the Regional Director for Region 5 that it did not have any interest in obtaining the Employer's ride-on forklift work for the employees it represents. During the hearing, Operating Engineers reiterated its disclaimer of the disputed work and then moved to quash the notice of hearing issued herein.

B. *The Work in Dispute*

The parties stipulated at the hearing that the work in dispute involves the operation of ride-on forklifts which transport metal studs, wallboard, and other materials from a loading area at the con-

[5] After hiring Schwesig on November 4, the Employer paid to Operating Engineers those fringe benefit contributions which would have been required under the Union's areawide agreement with the Construction Contractor's Council.

[6] Coakley's secretary did not testify at the hearing.

struction site to the interior of the Dirksen Senate Office Building.

C. *Contentions of the Parties*

Operating Engineers argues that there is no reasonable cause to believe that it has violated Section 8(b)(4)(D) and that, therefore, the dispute is not properly before the Board and the notice of hearing should be quashed. Operating Engineers contends that because it has disclaimed the disputed work there is no existing work assignment dispute in this proceeding. Alternatively, it asserts that there is no clear showing that it threatened, coerced, or restrained the Employer with an object of forcing the Employer to assign the disputed work to employees represented by it. In this regard, Operating Engineers claims that Schwesig's removal from the jobsite was based solely on the Employer's refusal to enter into a collective-bargaining agreement with it. Operating Engineers points out that it legally could not collect pension and welfare contributions on Schwesig's behalf until the Employer signed a contract. Finally, it argued at the hearing that there is an agreed-upon method for the voluntary adjustment of the dispute based on the Employer's contract with Tompkins and the affiliation of both labor organizations with the Building and Construction Trades Department, AFL-CIO.

The Employer argues that a jurisdictional dispute exists in this case. The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated since Operating Engineers removed Schwesig from his job as hoist operator in support of its demand that the disputed work be assigned to employees represented by it, and then caused a work stoppage by threatening the Employer's project manager with adverse consequences if the Employer continued to operate the hoist or forklifts at the jobsite. It further argues that there is no agreed-upon method for resolving the instant dispute because it does not participate in and is not bound by determinations of the Impartial Jurisdictional Disputes Board. Finally, the Employer urges that its assignment of the disputed work to its employees represented by Laborers should be upheld on the basis of its collective-bargaining agreement with Laborers, its preference and past pactice, area practice, and efficiency and economy of operations.

The Laborers position essentially agrees with that of the Employer.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) there is no agreed-upon method for voluntary resolution of the dispute.

With respect to (1), above, the record discloses that the Employer assigned the work in dispute to employees represented by Laborers in late November or early December. After the Employer refused to sign Operating Engineers areawide contract on December 18, Davidson immediately removed hoist operator Schwesig from the Dirksen project. Davidson then told the Employer's project manager that "something would happen" if the Employer touched the hoist or forklifts. The Employer remained on the jobsite, but shut down its forklift and hoist operations. Thereafter, during a meeting with the Employer on December 20, Davidson insisted that the dispute could not be resolved until the Employer assigned the disputed work to employees represented by Operating Engineers. Davidson also mentioned that Operating Engineers would operate the Employer's forklifts at an apprentice wage rate lower than that earned by employees represented by Laborers. While Davidson denies that he engaged in proscribed activity to obtain the Employer's forklift work for employees represented by Operating Engineers,[7] a conflict in testimony does not prevent the Board from proceeding under Section 10(k) for, in this proceeding, the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding such a violation. Accordingly, without ruling on the credibility of the testimony at issue,[8] we find that the Operating Engineers conduct in removing Schwesig from the project and its subsequent veiled threat to picket the Employer on the jobsite clearly demonstrate that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

In reaching this conclusion, we note that Operating Engineers seeks to quash the notice of hearing on the ground that it has disclaimed an interest in the disputed work. It is well established that a jurisdictional dispute no longer exists when one of the competing unions or parties effectively renounces its claim to the work at issue.[9] The party

[7] During the hearing, Davidson admitted that, after removing Schwesig from the jobsite, he told Yorty, the Employer's project manager, "not to touch the hoist." Davidson further testified on cross-examination that he could have mentioned the forklifts, as well as the hoist, in his conversation with Yorty.

[8] See, e.g., *Local Union No. 334, Laborers International Union of North America, AFL-CIO (C. H. Heist Corporation)*, 175 NLRB 608, 609 (1969).

[9] *General Building Laborers' Local Union No. 66 of the Laborers' International Union of North America (Georgia-Pacific Corporation)*, 209 NLRB 611 (1974), and cases cited therein.

raising such an issue, however, has the burden to satisfy the Board's requirements of a clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute.[10] Applying this criteria to the circumstances present in the instant case, we conclude that the Operating Engineers disclaimer is ineffective for the reasons set forth below and, thus, does not warrant our quashing the notice of hearing.

At the outset of the hearing, counsel for Operating Engineers read into the record a statement that Operating Engineers would not engage in unlawful conduct to secure the Employer's forklift work at the Dirksen Senate Office Building project. He subsequently made, *inter alia*, the following comments in reference to this issue:

> Whether or not at some future time under an appropriate collective-bargaining agreement, Local 77 [Operating Engineers] would seek to exercise whatever rights it has under a collective-bargaining agreement is really something that cannot be determined at this point in time.

Thereafter, during the course of the hearing, Davidson was asked on cross-examination, "Do you think when Coakley [the Employer] uses Laborers to operate forklifts, that's your work?" Davidson replied: "Sure, because it's stated in this book [the Operating Engineers areawide contract] here." We conclude on the basis of the foregoing statement by the Operating Engineers counsel and its business representative's record testimony that Operating Engineers is continuing to assert a jurisdictional claim to the Employer's forklift work on behalf of the employees it represents. Thus, we find that the Operating Engineers disclaimer should not be honored since it must be inferred from the Operating Engineers conduct at the hearing that it will persist in its efforts to obtain the disputed work. In these circumstances, we believe that the policies of the Act and the direction of Section 10(k) require that the Board issue a Determination of Dispute in this case. Accordingly, we hereby deny the motion to quash the notice of hearing.

With respect to (2), above, Operating Engineers argued at the hearing that an agreed-upon method for the voluntary adjustment of this dispute exists because the parties are bound to submit jurisdictional disputes to the IJDB for determination. It is undisputed that the Employer is not required to submit such disputes to the IJDB under its existing collective-bargaining agreement with Laborers. Nevertheless, Operating Engineers asserted that the Employer's subcontracting agreement with Tompkins obligates the Employer to IJDB procedures. We find no merit in this contention.

Operating Engineers initially contended that the Employer has stipulated to a provision in the prime contract for the project which allegedly requires the submission of all jurisdictional disputes to the IJDB. In this regard, article V of the subcontracting agreement between the Employer and Tompkins requires that the Employer's "labor policy . . . be in agreement with the prime contract and the Subcontractor shall employ no labor that will cause conflict with other labor employed at the site." Since the parties did not introduce into evidence the prime contract entered into by Tompkins, we are unable to determine whether there is a provision that stipulates Tompkins to IJDB procedures. However, even if the prime contract did contain such language, we would not regard as controlling the vague provision, quoted above, incorporated into the Employer's subcontract. The Board has consistently held that an employer is not bound to the IJDB unless it has expressly agreed to be so bound.[11]

In the alternative, Operating Engineers urges that the Employer is bound to the IJDB by the following clause in its contract with Tompkins:

> Article XI (b) - The Subcontractor agrees to abide by the prevailing practice of the Construction Industry and to request the assistance of the Contractor's Construction Council in any matters involving jurisdictional disputes. Should this agency fail to resolve any such matters, the Subcontractor shall request a decision from the National Labor Relations Board.

In rejecting the Operating Engineers argument, we note that the foregoing provision does not even mention the IJDB as a mechanism for resolving jurisdictional disputes. Accordingly, having previously found that reasonable cause exists to believe that Operating Engineers violated Section 8(b)(4)(D) of the Act, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires that the Board make an affirmative award of the disputed work after giving due consideration to various relevant factors.[12] As the Board has frequently stated, the

[10] *Laborers' International Union of North America, Local 935, AFL-CIO (C & S Construction Co., Inc.)*, 206 NLRB 807 (1973).

[11] See, e.g., *Local No. 17, Sheet Metal Workers International Association, AFL-CIO (J. Slotnik Company)*, 197 NLRB 1127 (1972).

[12] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961); *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

determination in a jurisdictional dispute case is an act of judgment based on commonsense and experience in weighing these factors. The following factors are relevant in making a determination of the dispute before us.

1. Board certifications and relevant collective-bargaining agreements

There is no evidence that either of the labor organizations concerned herein has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees.

The Employer has no collective-bargaining agreement with Operating Engineers. Article II, section 2(B), of the existing collective-bargaining agreement between the Employer and Laborers provides, *inter alia*, as follows:

> Tending shall consist of preparation of materials and the handling and conveying of materials to be used by mechanics of other crafts, whether such preparation is by hand or any other process. After the material has been prepared, tending shall include the supplying and conveying of said material and other materials to such mechanic, whether by bucket, hod, wheelbarrow, buggy, or other motorized unit used for such purpose, *including forklifts*. [Emphasis supplied.]

Therefore, we conclude that Laborers contract with the Employer covers the work in dispute.

Accordingly, while there are no certifications which would favor an award of the disputed work to employees represented by either Laborers or Operating Engineers, we find that the Laborers existing collective-bargaining agreement with the Employer favors an award of the ride-on forklift work to employees represented by Laborers.

2. Employer assignment and preference

The Employer has assigned the work in dispute to its employees who are represented by Laborers, and has manifested a preference to continue that assignment. We therefore find that this factor favors an award of the disputed work to employees represented by Laborers.

3. Relative skills

It is clear from the record that employees represented by either Laborers or Operating Engineers are equally capable of operating the Employer's ride-on forklifts to transport materials at the Dirksen project. Accordingly, we find that this factor does not favor an award of the disputed work to employees represented by either labor organization.

4. Industry and area practice

There is no specific evidence regarding the industry practice concerning the work in dispute. With respect to area practice, the Employer's president testified that all contractors in the Employing Plasterers' Association, of which the Employer is a member, assign the disputed work to employees represented by Laborers. The Operating Engineers business representative, Davidson, also testified, however, that employees represented by Operating Engineers have performed the disputed work in the Washington, D.C., area.

In view of the foregoing, we conclude that both industry and area practice are inconclusive and do not favor an award of the disputed work to employees represented by either Laborers or Operating Engineers.

5. Economy and efficiency of operations

The record indicates that the Employer's employees represented by Laborers ordinarily use the ride-on forklifts about 2 hours each day. When the forklifts are not in operation, the employees represented by Laborers are engaged in the preparation and handling of materials for other building and construction crafts. The Employer currently has no employees represented by Operating Engineers. Under these circumstances, employees represented by Operating Engineers would be employed for the purpose of performing only 2 hours' work per day if they were awarded the disputed work. Accordingly, we find that the factors of economy and efficiency of operations favor an award of the disputed work to employees represented by Laborers.

Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that the Employer's employees who are represented by Laborers' International Union of North America, Local Union 74, AFL-CIO, are entitled to perform the work in dispute. We reach this conclusion based on the Employer's current collective-bargaining agreement with Laborers, the Employer's preference and past practice of assigning the disputed work to these employees, and the factors of economy and efficiency of the Employer's operations. Accordingly, we shall determine the instant dispute by awarding the disputed work to employees represented by Laborers' International Union of North America, Local Union 74, AFL-CIO, but not to that Union or its members. Additionally, we find that Operating Engineers is not entitled by means proscribed under Section 8(b)(4)(D) of the Act to force or require the Em-

ployer to assign the disputed work to employees represented by it.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of C. J. Coakley Co., Inc., who are represented by Laborers' International Union of North America, Local Union 74, AFL-CIO, are entitled to perform the work involved in operating the Employer's ride-on forklifts at the Dirksen Senate Office Building project.

2. International Union of Operating Engineers, Local Nos. 77, 77-A, 77-RA, 77-B, 77-C, 77-D, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require C. J. Coakley Co., Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Union of Operating Engineers, Local Nos. 77, 77-A, 77-RA, 77-B, 77-C, 77-D, AFL-CIO, shall notify the Regional Director for Region 5, in writing, whether or not it will refrain from forcing or requiring C. J. Coakley Co., Inc., by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work to employees represented by it rather than to employees represented by Laborers' International Union of North America, Local Union 74, AFL-CIO.